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**From:** Schaaf, Eric [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=07DFEBAC6733411E94963ECF47A95070-SCHAAF, ERIC]  
**Sent:** 11/17/2020 1:42:27 PM  
**To:** LaPosta, Dore [LaPosta.Dore@epa.gov]; Simon, Paul [Simon.Paul@epa.gov]  
**Subject:** RE: From InsideEPA - Biden EPA Expected To Weigh Restoring Regions' Enforcement Roles

Interesting – thanks for forwarding.

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**From:** LaPosta, Dore <LaPosta.Dore@epa.gov>  
**Sent:** Monday, November 16, 2020 5:40 PM  
**To:** Schaaf, Eric <Schaaf.Eric@epa.gov>; Simon, Paul <Simon.Paul@epa.gov>  
**Subject:** Fwd: From InsideEPA - Biden EPA Expected To Weigh Restoring Regions' Enforcement Roles

Dore LaPosta 212 637 4031

Begin forwarded message:

**From:** "Anderson, Kate" <Anderson.Kate@epa.gov>  
**Date:** November 16, 2020 at 5:24:07 PM EST  
**To:** "LaPosta, Dore" <LaPosta.Dore@epa.gov>  
**Subject:** Fwd: From InsideEPA - Biden EPA Expected To Weigh Restoring Regions' Enforcement Roles

Sent from my iPhone

Begin forwarded message:

**From:** "Gorman, John" <Gorman.John@epa.gov>  
**Date:** November 16, 2020 at 10:48:15 AM EST  
**To:** "Gorman, John" <Gorman.John@epa.gov>  
**Subject:** From InsideEPA - Biden EPA Expected To Weigh Restoring Regions' Enforcement Roles

November 13, 2020

A former Clinton EPA official says he expects the incoming Biden administration to consider restoring to the agency's 10 regions the discretion they previously held through the Obama presidency to oversee a series of environmental enforcement actions, part of an effort to immediately bolster overall enforcement.

For EPA that has meant enforcement was "shifted away from the regions and more toward the headquarters folks, and in some cases to the administrator," Cliff Rothenstein, a former EPA deputy assistant administrator in EPA's waste office and now a government affairs advisor at law firm K&L Gates, said during a Nov. 5 webinar on the Biden administration agenda.

“They'll go back and review some of those and decide whether to change that,” he added.

Rothenstein was referring to a series of actions taken by former EPA Administrator Scott Pruitt, who early in his tenure centralized authority for a series of enforcement actions that regions had previously overseen.

For example, officials issued a May 2017 policy requiring regional staff to get permission from headquarters officials in EPA's enforcement office before issuing information requests to industry under the Clean Air Act, Resource Conservation & Recovery Act and Clean Water Act.

Pruitt also issued a May 2017 policy removing from EPA's waste chief and regional administrators previously delegated Superfund authorities for choosing cleanup remedies in records of decision (RODs) expected to cost more than \$50 million, and returning them to the administrator's office.

At the time of their issuance, Trump administration officials and some in industry downplayed the policies' significance, but former enforcement officials warned that they would have a chilling effect on future enforcement actions.

“People at EPA can read tea leaves. You think that some enforcement director in a region who wants to keep his job is going to be as aggressive as before?,” one former official said at the time.

But in the face of the Trump administration's decline in enforcement actions, Rothenstein and others say that increased enforcement actions by EPA and the Department of Justice (DOJ) could provide the Biden administration an opportunity to immediately distinguish itself as it grapples with how to withdraw, reverse and unravel Trump policies.

In addition, a divided Congress, with the Senate remaining in Republican control pending the outcome of two runoff elections in Georgia Jan. 5, likely forecloses the use of the Congressional Review Act for sweeping reversals of Trump rules.

And withdrawing or repealing Trump orders and rules will take time for an incoming Biden administration because in some cases they will require notice-and-comment under the Administration Procedure Act, a process that could take several years to complete.

So that leaves expanded enforcement as an option for President Biden to quickly make his mark because it's mostly a matter of priority and resources, industry lawyers say.

### **Robust Enforcement Initiative**

“EPA does not need a regulation. They don't need legislation to begin enforcement actions,” Rothenstein said. “Under a Biden administration they're probably going to very aggressively start a robust enforcement initiative to move forward on important things.”

For EPA that could translate into a reversal of the Trump administration's centralized approach to setting enforcement priorities by returning more delegated authority to regional offices closer to local concerns and conditions regarding pollution.

"There have been a lot of changes during the Trump administration on things like the delegation of authority within various agencies, and what that means is, . . . who has the authority to sign enforcement orders on [RODs]," Rothenstein said.

A Biden EPA will also likely allow regions to "start issuing information orders," he added.

Other attorneys are also offering a range of other suggestions for how they expect a Biden administration to bolster environmental enforcement.

For example, several have suggested the Biden administration's legal team could have an immediate impact on enforcement by reversing a controversial DOJ policy barring the use of "supplemental environmental projects" to encourage industry settlements.

"It is also likely that the Biden administration will take a more expansive view of its settlement authorities," says [a post-election analysis](#) by law firm Wilmer Hale. "Perhaps most notably, the once-popular use of environmentally beneficial Supplemental Environmental Projects [SEPs] as a component of civil settlements may see a comeback."

The use of SEPs could also bolster another Biden administration priority -- increasing consideration of environmental justice -- by benefiting local communities most affected by industrial facilities. "These projects, which typically must have some nexus to the underlying violation, have been used in the past to benefit local communities," says the Wilmer Hale analysis issued Nov. 9.

Other former EPA officials also expect the Biden administration to increase use of SEPs. "I think that [barring SEPs] was an extremely unpopular position among both many in the regulated community and prosecutors and enforcement officials across the board, and I would anticipate that policy will likely be revisited once a new team takes over" at DOJ's Environment and Natural Resources Division, Ethan Shenkman, EPA's deputy general counsel in the Obama administration who is now a partner at law firm Arnold and Porter, said during a Nov. 10 webinar.

The Wilmer Hale analysis also expects the Biden administration to eventually expand the reach of some Trump-era regulations, such as those governing the jurisdiction of the Clean Water Act, which will eventually drive increased enforcement.

"In addition to an uptick in enforcement brought about by a more assertive EPA, the jurisdictional interpretation under which EPA may bring enforcement actions will return to the pre-Trump approaches or, in some cases, even expand as the Biden administration restores environmental regulations and policies rolled back by the Trump administration," the firm says.

## NEPA Rules

But not all Trump initiatives will be subject to reversal under a Biden administration, according to Shenkman, who cites in particular a controversial rule for streamlining the National Environmental Policy Act process for reviewing the impact of industrial and other projects.

According to Shenkman, the NEPA rule could offer an unintended benefit for Biden's goal of a net-zero carbon economy by 2050 by speeding reviews for renewable energy and other low-carbon projects.

"There are any number of initiatives, regulatory initiatives that the Trump administration pursued in the name of streamlining environmental review and permitting for major infrastructure projects" and some of those may be retained, Shenkman said.

He noted that "it's not clear entirely whether the Biden administration will seek to reverse everything that happened in the Trump Administration with regard to environmental review and permitting, because of course the Biden-Harris administration also very much supports a program of intensive infrastructure build out especially for renewable energy projects that are critical to the energy transition."

Shenkman said "all of those renewable energy projects whether their wind farms or solar farms, et cetera, are subject to the same vast complex of environmental review and permitting as other kinds of infrastructure projects."

Either way, industry lawyers are alerting clients to anticipate major energy and environmental policy changes under a Biden administration.

"Regulated entities should follow these expected changes closely and anticipate greater enforcement of environmental laws over the next four years," says the Wilmer Hale analysis. "Companies should consider taking proactive measures, including by examining internal environmental compliance, and by engaging in the regulatory process through the public review and comment as proposed regulations are published."

But rulemakings can take time, the firm notes, stressing again the near-term likelihood for increased industry exposure to enforcement actions.

"The regulatory process is a deliberate one, so many of these enhanced environmental enforcement tools will take time to implement," the Wilmer Hale analysis says. "However, where the Biden administration can use executive orders, guidances, formal initiatives or other non-regulatory tools to reverse Trump-era environmental policies, enforcement actions could come sooner." --  
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